SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 269

ELIZABETH ROSPIGLIOSI,

Petitioner

vs.

DUDLEY J. CLOGHER,

Respondent

PETITION FOR REHEARING UPON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND SUPPORTING BRIEF

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Under order of this Court dated November 10, 1950, the time for filing a Petition for Rehearing was extended

by the Chief Justice to and including November 30, 1950; a rehearing upon the petition for writ of certiorari filed in this cause is hereby prayed for within said extended time upon the grounds set forth hereinafter.

GENERAL STATEMENT AS TO CONTENTS OF PETITION FOR WRIT OF CERTIORARI

A. THE FACTS.

The petition for writ of certiorari sought review of a money judgment against petitioner based upon an alleged oral contract made by her to share with the respondent profits in petitioner's stock account. The respondent alleged an oral agreement, the circumstances attending and preceding which allegedly were as follows: Respondent while manager of the Miami office of Bache & Co., was approached by petitioner for some advice on her account with Bache & Co. During a course of transactions in which respondent in his capacity as manager of the Miami ooffice of Bache & Co. handled petitioner's account, respondent and petitioner orally contracted and agreed that they would jointly conduct stock market operations, petitioner to furnish the capital and respondent to manage the capital and contribute his knowledge of stock market operations, all profit derived from such operations to be divided equally by petitioner and respondent.

The testimony shows that at the tme of this alleged oral contract, respondent was a registered employee of a member of the New York Stock Exchange, to wit: Bache & Co., and was being paid by said member for services which respondent furnished the petitioner and which respondent alleges to have been his part of the consideration

for said oral contract to share profits. In fact, as manager of the Miami office of Bache & Co., it was respondent's duty to perform not only for petitioner, but all other clients of Bache & Co. who might come to him for such advice, the very services which respondent claims were his contribution to the partnership. Such a contract, even if actually entered into, was a direct violation on the part of respondent of a rule of the New York Stock Exchange prohibiting such contracts from being entered into. (See pages 2 and 3 of Petition). This rule was well known to respondent and was not known to petitioner. Respondent further knew that such a contract was void and that as manager of Bache & Co., he was not only performing an illegal act as far as petitioner was concerned, but was seeking to obtain compensation from a customer of his firm for services which he was duty bound to perform for said customer and for which services he was being paid by his firm.

Section 15, U.S.C.A. 78cc is set forth on pages 3 and 4 of the Petition and declares:

(a) "Any condition, stipulation or provision binding a person to waive compliance with any rule of an exchange required thereby shall be void",

(b) "Every contract made in violation of these provisions, the performance of which involves the violation of any relationship condemned by the provisions of the chapter, shall be void as regards the right of any person who shall have engaged in the performance of any such contract".

The Court will not in the language the word "Void" is used and not "Voidable".

The Supreme Court of Florida held the contract valid and affirmed the money judgment based thereon. (pp. 4-8 of Pet.).

B. JURISDICTION OF COURT.

Title 28 U.S. Code, Sec. 1257 is alleged as a basis of jurisdiction of the Court. Inasmuch as review of a final judgment of the highest Court of the State of Florida is sought by writ of certiorari, petitioner contends that the contract, on which the judgment sought to be reviewed was based, was void ab initio, and being void, no such action as was brought by respondent can be sustained.

C. REASON FOR ALLOWANCE OF WRIT.

Under Rule 38 of the United States Supreme Court, p. 5, Sec. A., although the allowance of a review of said writ is not a matter of right but of sound judicial discretion and will be granted only when there are special and important reasons therefor, it would appear that the following considerations are of sufficient importance to secure the granting of the petition, to wit: A state court has decided a Federal question of substance not theretofore determined by the Supreme Court, petitioner's contention that the invalidity of the contract on which respondent's action is based has never been decided by any Federal Court and it is a matter which if allowed to stand in status quo will certainly impair the effectiveness of the rules of every stock exchange in America and defeat the purpose of all Federal legislation regulating the same.

D. GROUNDS OF THIS PETITION FOR REHEARING.

1. It is the contention of petitioner that the question decided is one of great importance, is a Federal question of substance and that public policy furnishes a compelling reason for the consideration of this question by this Honorable Court.

We feel that the Court, in the consideration of this matter, has been misled by the contention of the respondent that the alleged contract between petitioner and respondent has been fully executed and that petitioner should not be permitted to keep the fruits and profits of the contract and refuse to pay respondent the amount which by an alleged account she admitted to be due him. *We feel that this is the fundamental error in the reasoning of the Florida Supreme Court.*

All the monies involved in this case were monies which were the property of the petitioner, having been profits accruing to petitioner's stock account with Bache & Co. as the result of purchases and sales of stocks.

Respondent having been prohibited from having any interest in customers' accounts obviously could not make any partnership agreement that was valid and binding on petitioner.

The monies received by petitioner from this stock account were her own property and under the rules of the stock exchange which bound respondent, respondent was not entitled to have received anything from this account of petitioner's.

The state of facts developed at the trial shows that respondent already has illegally taken from petitioner large sums of money which were her sole property.

THE PUBLIC POLICY AND THE FEDERAL REGULATIONS FOLLOWING THEREFROM WERE DEVELOPED IN AN EFFORT TO PROTECT PERSONS SUCH AS PETITIONER FROM THE VERY THING RESPONDENT HAS SUCCEEDED IN ACCOMPLISHING IN THIS CASE.

The public policy grew out of the fact that widows had been too often defrauded of monies, rightfully theirs, by scheming and conniving rascals cloaked with the apparent respectability of a stock exchange firm.

To permit such a judgment to stand is so abhorrent to public morals that we feel this Honorable Court should reconsider the petition for certiorari and examine into the questions presented by the original petition and this petition for hehearing.

The cases cited in the brief of respondent illustrate petitioner's claim that the nature of this transaction has been misunderstood in the courts below.

The venture on which this action was based was not, as far as petitioner was concerned, an illegal venture as petitioner was trading through a recognized stock exchange house in standard securities, trading which resulted in a profit to her account. The business transacted, therefore, was a legal and not an illegal business.

Where the illegality enters the picture is in the re-

spondent attempting to get for his own use by an illegal contract petitioner's profits in her stock exchange account.

Under all rules of the Securities and Exchange Commission, the New York Stock Exchange and sound business and good morals, all of the profits in this account were petitioner's. By no stretch of the imagination can respendent have any interest in these profits.

The illegality complained of by the petitioner does not refer to the stock account but refers to the alleged oral contract to share profits in petitioner's account which contract is declared void by Federal statute (15 U.S.C.A. 78cc) and which contract is one which respondent was prohibited from entering into by the rules established by the Securities Exchange Act of 1934, U.S.C.A. 78a et seq.

During the boom following the First World War, many persons who never before had been interested in dealing with stock exchange houses or other brokerage firms became investors, and in the wild scramble for profits which reached its peak in the late 20's the number of persons involved in stock exchange operations became tremendous. When the bubble burst most of these investors became shorn lambs, and a sober survey of the situation brought to the public's attention such flagrant violations of all moral codes that our system of stock exchanges became endangered to such a point that the unsavory situation aroused public indignation and caused the enactment of the laws creating the Securities and Exchange Commission.

In fact, the situation was so bad that the whole financial structure of our country became imperiled. Not only the law-makers but those firms interested in the New

York Stock Exchange and other exchanges realized that in order to regain the confidence of the potential investing public strict rules and regulations must be adopted to protect the general public from the evils which had developed in the handling of investors' money by brokers during the prior period of unbridled speculation. Our law-makers realized that an employee of stock exchange firms was in a position of trust and that if the public was to be interested in the investment of its funds there must be a new code of ethics established the avowed purpose of which would be to protect the investor as fully as possible from being taken advantage of or being victimized in his dealings in the stock market, the stock market being essential to the transaction of business on which our system of free enterprise is based. If investors' funds were cut off, the effect on business would certainly be disastrous.

With this end in view, the Securities Exchange Act of 1934 was passed. The purpose of this Act was to protect the investing public from fraud in investments in securities through exchanges and by the maintenance of fair and honest dealings between the investor and stock exchange houses. Public policy demanded these rules as being necessary to restore the faith of the public in stock exchange trading and to prevent employees of stock exchange member firms from taking unfair advantage of customers, it being realized that the knowledge and experience was on the side of the employee of the member firm and that the investor must be protected in relying on such advice as might be given by such employees. These regulations were designed to protect the investor and with a view to affording such protection, contracts such as that claimed by respondent in this action were declared "Void" and not "Voidable". The use of the word "Void" is especially sig-

nificant as it indicates that such contracts as the one sought to be enforced here are malum in se.

2. The Securities Exchange Act of 1934 definitely establishes as public policy:

(a) That the public must be protected in dealing with members of an exchange;

(b) That this protection is afforded through rules of the exchange regulating the dealings of its members with the public;

(c) That such rules of protection must be passed and approved by the Securities and Exchange Commission prior to the registration of any exchange;

(d) That these rules for protection of the public must be observed regardless of any attempt to waive the same by any party for whose protection they were passed.

The affirmance by the Supreme Court of Florida of the money judgment in favor of said manager against the petitioner, representing profits in her stock account, renders a mockery and a sham and useless and ineffective (a) the said rule of said exchange, (b) the action of the Securities and Exchange Commission in approving said rule as required by Federal law prior to the exchange doing business, (c) the Federal statute making void a waiver of the rule by those for whose protection it was passed, (d) and the main purpose of the Securities Exchange Act of 1934,— the protection of investors.

The judgment for profits from the account of petitioner with Bache & Co., in favor of the manager of the

Miami Office of Bache & Co., which profits were made while he was such manager, enforces a contract directly contrary to public policy as crystallized by the Securities Exchange Act of 1934.

In *Ritter v. Mutual Life Insurance Co.*, 169 U.S. 139, 42 L ed. 693, 18 Sup. Ct. Rep. 300, this court used the following language:

> "Any contract, the tendency of which is to endanger the public interest and affect the public good, and which is subversive of sound morality, ought never to receive the sanction of a court of equity or be the foundation for its judgment."

In *McMullen v. Hoffman*, 174 U.S. 639, 43 L ed. 1117, 19 Sup. Ct. Rep. 839, this Court used the following words:

> ". . . to permit a recovery in this case is in substance to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract and it permits the defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest . . . . and it is only allowed for public consideration and in order the better to secure the public against dishonest transactions. To refuse . . . judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protec-

> tion of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them."

In *Hurd v. Hodge*, 334 U.S. 24, 68 S.C. 847, 92 L ed. 1187, this court used the following words:

> "The power of Federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents."

Cases from other jurisdictions in the United States develop the concept of public policy and its effect on the validity of contracts as follows:

In *People ex rel Arkansas Valley Sugar Beet and Irrig. Land Co. v. Burke*, 72 Colo. 486, 212 P. 837, 30 A.L.R. 1085, these words were used:

> "Courts have no right to ignore or set aside a public policy established by the legislature."

In *Divide County v. Baird*, 55 N.D. 45, 212 N.W. 236, 51 A.L.R. 296, the following language was used:

> ". . . the contract which a court of equity is here asked to enforce was not only impliedly forbidden, but it was also contrary to a well-defined legislative policy. In such circumstances, the authorities with substantial unanimity refuse to give any relief thereunder; and such is the necessary result of the recent holdings of this court."

In *Bartron v. Codington County*, 140 A.L.R. 550, 68 S.D. 309, 2 N.W. 2d 337, the following language was used:

> "A policy reflected by the established trend of constitutional or statutory provisions, or of the decisions of the courts, or of administrative practices, constitutes a public policy."

Respectfully submitted,

JOHN P. BOOTH, Attorney for Petitioner.

CERTIFICATE OF COUNSEL

I, JOHN P. BOOTH, attorney for Peitioner, in the above and foregoing Petition for Rehearing, do hereby certify that said Petition for Rehearing is presented in good faith and not for delay, and I do further certify that said petition is restricted to grounds not previously presented.

JOHN P. BOOTH
Attorney for Petitioner

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RESPONSE TO PETITION FOR REHEARING AND TO SUPPORTING BRIEF

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RESPONSE TO PETITION FOR REHEARING AND TO SUPPORTING BRIEF

The respondent, Dudley J. Clogher, in response to the petition for rehearing filed by the petitioner, and to the supporting brief filed by the petitioner, says:

1. Said petition for rehearing does not state grounds which are confined to intervening circumstances or to other substantial grounds available to petitioner although not previously presented, as required by Amended Rule 33 of the United States Supreme Court Rules.

2. The petition for rehearing sets forth only two grounds therefor, ground one being set forth on page 5 of said petition and the other ground being set forth on page 9 of said petition. Both of said grounds are based on principles of public policy. These public policy grounds were set forth and argued by the petitioner on pages 16, 22, 23 and 26 of petitioner's brief supporting the petition for writ of certiorari. The respondent replied to the argument on public policy and cited cases in support of his position on pages 21 and 22 of the brief of respondent. Consequently said public policy grounds were previously presented and considered by this court.

3. On page 5 of her petition for rehearing the petitioner in substance states that the fundamental error in the reasoning of the Florida Supreme Court was the ruling that the contract had been fully executed and that petitioner should not be permitted to keep the fruits and profits of the contract. As pointed out on pages 8 to 14 of the brief of respondent, since the original partnership agreement has been fully executed, it is immaterial whether or not the contract was invalid under the federal statute on account of an alleged violation of a rule of a private stock exchange, and the right to recover on the account stated is purely a matter of state law. Even if the Florida Supreme Court decided this point incorrectly, the Supreme Court of the United States would have no jurisdiction, since this is purely a matter of state law.

4. On page 3 of her petition for rehearing, petitioner undertakes to quote Sub-Sections (a) and (b) of Section 15 U.S.C.A. 78cc, and petitioner states that said law is set forth on pages 3 and 4 of her petition for writ of cer-

tiorari. The Court's attention is called to the fact that, although said language is enclosed in quotation marks in the petition for rehearing, such language is neither a correct quotation from the statute nor a correct quotation from the petition for said writ. Certain language has been omitted, certain language has been added, and certain language has been paraphrased, particularly in Sub-Section (b), and this change of language might have an important effect on the meaning of the statute. This mistake was no doubt unintentional.

5. The Supreme Court of the United States has no jurisdiction for the reasons set forth on pages 5, 6, 7 and 8 of the brief of respondent.

6. This case is an ordinary one involving a small sum of money and no important principle or precedent, and is not worthy of the attention of the highest court in the land, as pointed out on page 14 of respondent's brief.

For the reasons set forth above, the petition for rehearing should be denied.

Respectfully submitted,

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